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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 125

IN THE MATTER

of

EDWARD LAMB, FRANK C. OSWALD, EDWARD LAMB ENTERPRISES, INC. and AIR-WAY INDUSTRIES, INC.,

Petitioners,

against

ISADORE BLAU, a stockholder of AIR-WAY INDUSTRIES, INC., suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of AIR-WAY INDUSTRIES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STEMBER AND DERSHOWITZ,
J. EUGENE FARBER,
Of Counsel.

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EDWARD LAMB, FRANK C. OSWALD, EDWARD LAMB ENTERPRISES, INC. and AIR-WAY INDUSTRIES, INC.,

Petitioners,

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ISADORE BLAU, a stockholder of AIR-WAY INDUSTRIES, INC., suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of AIR-WAY INDUSTRIES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above named petitioners pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit entered March 8, 1963, which reversed the judgment of the United States District Court for the Southern District of New York entered after trial.

Opinions Below

The judgment of the United States District Court for the Southern District of New York was entered on July 6, 1961. There was no written opinion. The judgment is set forth in Appendix B hereto. The findings of fact and conclusions of law of the said United States District Court for the Southern District of New York were not officially reported and are set forth in Appendix C hereto. The opinion of the United States Court of Appeals for the Second Circuit, rendered March 8, 1963, is reported in 314 F. 2d 618 and is reproduced in Appendix D hereto and the decree of the Court of Appeals for the Second Circuit is reproduced in Appendix E.

Jurisdiction

The appeal to the Court of Appeals for the Second Circuit was decided on March 8, 1963. The mandate thereon issued to the United States District Court for the Southern District of New York on March 25, 1963, and was thereafter recalled by the said Court of Appeals for the Second Circuit on April 16, 1963, pending determination of this writ. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Under the provisions of Section 16(b) of the Securities Exchange Act of 1934 (15 U.S.C.A. Sect. 78(b)), must a plaintiff prove his ownership of a security of the issuer as a prerequisite to the commencement of an action brought pursuant to said statute?

2. If so, does such a plaintiff have the burden of establishing by a preponderance of the evidence his compliance with this prerequisite?

3. May the findings of fact and the judgment founded thereon by the Trial Court be reversed by the Appellate Court if said findings and judgment were based upon oral testimony and the credibility of the witness and are not clearly erroneous?

Statutes and Rules Involved

1. Section 16(b) of the Securities Exchange Act of 1934 (15 U.S.C.A. Sect. 78(b)).

2. Rule 9(a) of the Rules of Federal Civil Procedure.

3. Rule 17(a) of the Federal Rules of Civil Procedure.

4. Rule 52(a) of the Federal Rules of Civil Procedure.

The above statutes and rules are printed in Appendix A, *infra*, pages 12-13.

Statement

Isadore Blau, alleging himself to be a stockholder of Air-Way Industries, Inc. (hereinafter referred to as "Air-Way"), brought this action under the provisions of Section 16(b) of the Securities Exchange Act of 1934, to recover "short-swing" profits he alleged had been realized by the defendants as "insiders" of Air-Way. The case was tried without a jury on April 3 and 4, 1961, in the United States District Court for the Southern District of New York, where, at the conclusion of plaintiff's presentation of evidence to prove his ownership of a security of Air-Way at the time this action was commenced, petitioners' motions to dismiss the complaint and for judgment upon the ground that plaintiff had failed to meet his burden of proving that he was such a security owner were granted. The Court of Appeals reversed this decision and remanded the action for trial, the Court holding that the aforesaid plaintiff had

sufficient indicia of ownership to satisfy the statute despite the Trial Court's specific findings that he was not the owner of any security of Air-Way at the time this action was instituted and that he was, at most, a nominee for someone else.

Reasons for Granting the Writ

This case presents in a manner ripe for resolution a fundamental question involving the interpretation of a provision of Section 16(b) of the Securities Exchange Act of 1934, which has never before been passed upon by this Court: Must a person who seeks to avail himself of the cause of action created by Section 16(b) of the Securities Exchange Act of 1934 prove by a preponderance of the evidence that he was "the owner" of a security of the issuer at the time the action thereunder is commenced and, further, is such proof a jurisdictional prerequisite to the commencement of such action? The Court of Appeals has held that although such a plaintiff must prove ownership, such proof is needed merely to satisfy the provisions of Rule 17(a) of the Federal Rules of Civil Procedure, the real-party-in-interest Rule.

In addition to the interpretation of Section 16(b) and the aforesaid Rule, an interpretation of Rule 52(a) of the Federal Rules of Civil Procedure is also required. The Trial Court, based upon its findings as to the lack of credibility of the witness, found that the plaintiff's claim of ownership was false, perjurious, incredible and unworthy of belief. The record itself amply demonstrates the justification for such findings by the Trial Court. Although not "clearly erroneous" within the meaning of the aforesaid Rule 52(a) of the Federal Rules of Civil Procedure, the Court of Appeals has determined that the Trial Court's "view that Blau (the plaintiff) was acting for some nominee has no support whatsoever in the evidence; at best, it is only a guess, however shrewd a guess it may be."

If permitted to stand, this decision by the Court of Appeals reversing the decision of the Trial Court will have the effect of causing to these petitioners tremendous costs, despite the fact that the Trial Court based upon the evidence before it has specifically found that the plaintiff is not a person contemplated by the statute to be entitled to maintain this action. In addition, this decision by the Court of Appeals, if permitted to stand, would encourage the acquisition of securities of an issuer long past the time when a complained-of act or occurrence took place. Such acquisition could be made in the name of nominees, rather than in the names of the actual owners of the stock, thus putting a premium on champerty and maintenance. Such result is contrary to public policy and should not be permitted to stand, else the Courts will be flooded with lawsuits of this nature.

POINT I

A plaintiff seeking to avail himself of the cause of action created by Section 16(b) of the Securities Exchange Act of 1934 has the burden of establishing by a preponderance of the evidence his compliance with the conditions set by the statute as a prerequisite to the commencement of such action.

In the case of a violation of the provisions of Section 16(b) of the Securities Exchange Act of 1934, the statute permits an action to recover wrongful profits thereunder to be brought in the name of the issuing corporation. Failing such action by the issuing corporation, the right is given by the statute only to the owner of a security of the issuing corporation to bring such an action. This statute creates a new cause of action and under the provisions of Section 27 of the Securities Exchange Act of 1934 (15 U.S.C.A. 78aa), exclusive jurisdiction of such cause of action created by the statute is given to the United States District Courts. Since this statute provides the sole basis

for the jurisdiction of the Federal Court, it follows that all of the conditions of the statute must be satisfied by a plaintiff desiring to bring suit under its provisions. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 56 S. Ct. 709, 45 L. Ed. 155; *Birmingham Post Co.* v. *Brown* (5 C. A.), 217 F. 2d 127. Thus, a plaintiff other than the issuing corporation, under this statute, must allege and prove his compliance with the conditions set forth by the statute. *Birmingham Post Co.* v. *Brown* (5 C. A.), *supra; Daves* v. *Hawaiian Dredging Co.* (D. C. Hawaii), 114 F. Supp. 643; *Clyde* v. *Broderick* (10 C. A.), 144 F. 2d 348; *Lian Bros.* v. *United States* (D.C.S.D.N.Y.), 123 F. Supp. 20, aff'd (2 C. A.), 220 F. 2d 351. The failure of a plaintiff to allege the required elements necessary to bring the case within the provisions of a statute conferring jurisdiction upon the Court is jurisdictional, it is not waivable, need not be pleaded as an affirmative defense and need not be raised before trial. It has also been uniformly held that a plaintiff who is required to allege his compliance with all of the conditions set forth by a Federal statute creating a right of action also has the burden of proving his compliance with all of said conditions. *Birmingham Post Co.* v. *Brown* (5 C. A.), *supra; Daves* v. *Hawaiian Dredging Co.* (D. C. Hawaii), *supra; Clyde* v. *Broderick* (10 C. A.), *supra; Lian Bros.* v. *United States* (D.C.S.D.N.Y.), aff'd (2 C. A.), *supra;* 2 *Moore's Federal Practice* 2d 1905-6. The party invoking the District Court's original jurisdiction, has the duty of affirmatively alleging jurisdiction; and, if his allegations are controverted, the burden of establishing jurisdiction. *McNutt* v. *General Motors Acceptance Corp.*, *supra; Birmingham Post Co.* v. *Brown* (5 C. A.), *supra.*

POINT II

The Trial Court correctly held that the plaintiff had failed to sustain his burden of proving that he was the owner of a security of the issuer at the time the action was commenced by him.

It is clear that the Trial Court gave complete consideration to the documentary exhibits (App. 226a). [All references to "App." are to the Appendix in the Court of Appeals.] It is also clear that the Trial Court's findings were predicated upon the failure of the plaintiff to sustain his burden of proving that he was the owner of any stock of the issuer at the time this action was instituted (App. 227a). All that the documentary exhibits disclosed was that, at the time of the institution of the action, a margin account was maintained in the plaintiff's name with a stock broker; that in the account there were listed some shares of the issuer's common stock. The Trial Court was justified in permitting the introduction of evidence in order to go behind these documents to prove or disprove ownership. The Circuit Court of Appeals for the Third Circuit in *Gallup* v. *Caldwell*, 120 F. 2d 90, so held. In this case, although the account at the broker was carried in the name of another (the daughter of the plaintiff) the Court found that this was "for reasons of convenience" and that the stock in that account was actually owned by the plaintiff.

Since plaintiff was unable to produce any credible evidence whatsoever as to the source of the funds which he claimed to have paid to the brokers as a portion of the purchase price for the issuer's stock, the Trial Court was completely justified and correct in finding that he did not pay for it and was not the owner thereof. The Trial Court's disregard of the plaintiff's oral testimony as "perjurious" and "incredible" is fully substantiated by the record.

In his attempt to sustain his burden of proof as to the ownership of the issuer's stock at the time the action was commenced, the plaintiff, Isadore Blau, was the sole witness. His testimony was completely exploded as incredible and perjurious on every important and relevant point and the Trial Court so held. His failure to prove the source of the funds he claimed to have used for the acquisition of the stock listed in the brokerage account, together with the absence of any other indicia of ownership whatsoever, justified the Trial Court's conclusion that he was not the owner of the stock in the account. He admitted that he was unable to produce any evidence to show the source of the funds he claimed to have used (App. 208a-209a), his testimony as to the manner in which he paid for the stock was inconsistent with his other testimony at the trial (App. 141a, 143a-144a, 148a, 209a-210a, 217a), his testimony that he obtained the funds to pay for the stock from his savings bank account was inconsistent with his testimony that he never had more than $200 in the savings bank account (App. 204a-205a). In addition thereto, the balance of his testimony was inconsistent, incredible and unworthy of belief (App. 141a, 157a). Plaintiff was unable to (App. 208a-209a), was unwilling to (App. 224a), and did not, substantiate any portion of his oral testimony as to his ownership of the stock (App. 195a). His demeanor on the witness stand was observed by the Trial Judge (App. 225a), and helped and aided the Trial Court to arrive at its determination that plaintiff was not in fact the owner of the stock (App. 225a-226a).

The Trial Court correctly placed the burden of proving such ownership on the plaintiff under the provisions of the statute involved (App. 152a).

POINT III

The findings by the Trial Court, having been based upon oral testimony and the credibility of the witness were not so clearly erroneous as to be reversible.

The Trial Court correctly found that in view of the demeanor of the plaintiff while testifying and the incredible and perjurious nature of his testimony, as previously and as hereinafter set forth, that he had failed to prove that he was an owner of the issuer's stock at the time this action was commenced.

Despite every opportunity given to the plaintiff at the trial (App. 148a, 150a, 188a-189a) to produce any evidence whatsoever which would substantiate any portion of his incredible testimony, plaintiff was unable to do so (App. 189a, 208a-209a). His claim that all of his business was done in cash (App. 142a-143a, 155a), that he maintains no records whatsoever for income tax or other purposes (App. 182a, 149a-150a), that he keeps his money in a shirt pocket hanging in his closet or in a shirt pocket on his person (App. 156a-157a, 165a), his testimony concerning his savings bank account (App. 204a-205a), his incredible testimony as to his reason for purchasing the issuer's stock (App. 144a-145a, 147a-148a, 161a, 211a), and his demeanor while testifying, all justified and compelled the Trial Court's findings that it did not believe his testimony and that the improbability of his claim as to the source of the funds shows that he was not the true owner of the stock but that, at very most, he was a nominee for someone else (App. 226a).

In reviewing findings of a Trial Court under the provisions of Rule 52(a) of the Federal Rules of Civil Procedure [Appendix A, *infra*, p. 13], it is clear that an Appellate Court will not substitute its opinion for that of the Trial Court if the facts on which the opinion of the Trial Court

were based are such that reasonable men might differ as to a conclusion. *Federal Security Insurance Company* v. *Smith* (10 C. A.), 259 F. 2d 294. When a District Court has rejected the testimony of a witness and found it to be incredible, the Appellate Court must also disregard such testimony. *Hayes* v. *First Nat. Bank of Fairbanks* (9 C. A.), 192 F. 2d 393; *Nuelsen* v. *Sorensen* (9 C. A.), 293 F. 2d 454. Thus, for an appeal to succeed on the ground that the Trial Court's findings were "clearly erroneous", the burden on an appellant to reverse such findings is an extremely heavy one where, as here, the decision must turn largely on the credibility of witnesses the Trial Judge saw and heard. *Hedger* v. *Reynolds* (2 C. A.), 216 F. 2d 202. The Trial Court is the only place where the opportunity exists to view the witness, to examine his demeanor and to hear his testimony directly, rather than to read it in a printed record. There is no doubt that the result of this procedure clearly vests the Trial Judge with immense power not subject to correction, *Broadcast Music* v. *Havana Madrid Restaurant Corp.* (2 C. A.), 175 F. 2d 77, unless such certainty is present in the Appellate Court that it does not feel able to accept the view that the Trial Court accorded the proper effect to all of the cogent facts, still giving due regard to the Trial Court's appraisal of witness credibility. *Nee* v. *Linwood Securities Co.* (8 C. A.), 174 F. 2d 434.

> "The authorities all agree upon the proposition that the findings of fact by the lower Court who saw and heard the witnesses and made a critical examination of the exhibits are entitled to great weight and are to be taken as presumptively correct and, unless obvious error has intervened in applying some principle of law or some important mistake has occurred in weighing the evidence, the decree will not be reversed." *Stubnitz-Greene Spring Corporation* v. *Fort Pitt Bedding Co.* (6 C. A.), 110 F. 2d 192, 196.

A finding of fact is not "clearly erroneous" unless it is without evidence to support it, *Hudspeth* v. *Esso Standard Oil Co.*, (8 C. A.), 170 F. 2d 418, and is reversible only if no rational view of the evidence reasonably supports it. *Shapiro* v. *Rubens* (7 C. A.), 166 F. 2d 659.

> "• • • whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they must be treated as unassailable." *United States* v. *Aluminum Co. of America* (2 C. A.), 148 F. 2d 416.

Application of the above Rules conclusively show that the Circuit Court of Appeals erred in its reversal of the Trial Court's decision and judgment.

CONCLUSION

For the reasons stated, the petitioners respectfully pray that the writ of certiorari be granted.

Respectfully submitted,

JEROME M. STEMBER,
Attorney for Petitioners.

STEMBER AND DERSHOWITZ.
J. EUGENE FARBER,
Of Counsel.

May 1963

APPENDIX A

Statutes and Rules Involved

Securities Exchange Act of 1934
15 U.S.C.A. Sec. 78(b)

Section 16(b) provides as follows:

(Profits Realized from Purchase and Sales within Period of Less than Six Months)

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

Appendix A

Federal Rules of Civil Procedure

Rule 9(a) so far as is applicable:

"(a) CAPACITY. It is not necessary to aver the capacity of a party to sue or be sued * * * except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge."

Rule 17(a):

"17. (a) REAL PARTY IN INTEREST. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States."

Rule 52(a) F.R.C.P., so far as pertinent herein, provides as follows:

"* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

APPENDIX B

Judgment of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 113-395

ISADORE BLAU, a stockholder of the Air-Way Industries, Inc., suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of Air-Way Industries, Inc.

vs.

EDWARD LAMB, FRANK C. OSWALD, EDWARD LAMB ENTERPRISES, INC., EDWARD LAMB FOUNDATION, INC., and AIR-WAY INDUSTRIES, INC.

On July 6, 1961, findings of fact and conclusions of law having been filed by the Honorable Lloyd F. MacMahon, D.J., that the defendants are entitled to judgment against the plaintiff, dismissing the complaint and that the plaintiff pay the costs and disbursements of this action, it is

ADJUDGED: That the defendants have judgment against the plaintiff together with costs and disbursements of this action.

Dated: New York, N. Y.
July 6, 1961

S/ HERBERT A. CHARLSON
Clerk

J.J.

APPENDIX C

Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 113-395

ISADORE BLAU, a stockholder of Air-Way Industries, Inc., suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of Air-Way Industries, Inc.,

Plaintiff,

against

EDWARD LAMB, FRANK C. OSWALD, EDWARD LAMB ENTERPRISES, INC., EDWARD LAMB FOUNDATION, INC., and AIR-WAY INDUSTRIES, INC.,

Defendants.

The issues in this action having been tried before the undersigned without a jury at a Trial Term of this Court, Non Jury part, held in and for the Southern District of New York at the United States District Court House, Borough of Manhattan, City of New York on the 3rd and 4th days of April, 1961 and Morris J. Levy appearing as attorney for the plaintiff and Jerome M. Steinber, Morris Dershowitz and J. Eugene Farber appearing as attorneys for the defendants, and the parties hereto having presented their respective proofs and the same having been duly considered and due deliberation having been had, I find and decide as follows:

Appendix C

FINDINGS OF FACT

1. That this action was commenced on October 11, 1956.

2. That the plaintiff, Isadore Blau, was not the record or beneficial owner of the common stock or any other security of the defendant, Air-Way Industries, Inc., on October 11, 1956.

3. That on May 9, 1958, plaintiff, Isadore Blau, became the record owner of 105 shares of the common stock of Air-Way Industries, Inc.

4. That plaintiff, Isadore Blau, became the record owner of a security of Air-Way Industries, Inc. for the first time on May 9, 1958.

5. That there was no evidence adduced to prove the record ownership on October 11, 1956 of 100 shares of the common stock of Air-Way Industries, Inc. claimed to be owned by the plaintiff, Isadore Blau.

6. That plaintiff's testimony that he became the beneficial owner of 100 shares of the common stock of Air-Way Industries, Inc. on May 1, 1956 is perjurious, unworthy of belief, unsupported by any credible evidence and false.

7. That the testimony of the plaintiff, Isadore Blau, as to the manner in which he obtained funds to pay for 100 shares of the common stock of Air-Way Industries, Inc. on May 3, 1956 is perjurious, incredible, unworthy of belief, unsupported by any credible evidence and false.

8. That the prior testimony of plaintiff, Isadore Blau, that he paid for said stock by means of a bank money order is inconsistent and false.

9. That the prior sworn testimony of the plaintiff, Isadore Blau, that he obtained the cash to pay for said stock from his savings bank account is inconsistent with his testimony that he never had more than $200.00 in the bank in ten years.

10. That the testimony of the plaintiff, Isadore Blau, that he customarily paid for his stock in the form of a bank money order or out of funds on deposit with his broker is inconsistent with his testimony as to the manner in which he paid for the Air-Way stock.

11. That the testimony of the plaintiff, Isadore Blau, that he went to his attorney in mid-July, 1956 because the market price of the stock did not rise is false and perjurious.

12. That the testimony of the plaintiff, Isadore Blau, that he went to his attorney to discuss Ford Motor Co. and Air-Way Industries, Inc. is inconsistent with his prior sworn testimony.

13. That the testimony of the plaintiff, Isadore Blau, that he carried all his cash in his shirt pocket is incredible, unworthy of belief and false.

14. That the testimony of the plaintiff, Isadore Blau, that he kept all his cash in a shirt pocket hanging in his closet is incredible, unworthy of belief and false.

15. That the testimony of the plaintiff, Isadore Blau, as to his reason for buying 100 shares of the common stock of Air-Way Industries, Inc. is incredible, unworthy of belief, contradicted by his own testimony, unsupported by any credible evidence and false.

16. That the demeanor of the plaintiff on the witness stand, his inconsistent answers, his incredible testimony as to the source of the funds used to pay for 100 shares of common stock of Air-Way Industries, Inc., his incredible testimony as to his reasons for purchasing the said 100 shares of the common stock of Air-Way Industries, Inc. on May 1, 1956, the absence of any credible evidence whatsoever in support of his testimony, makes his entire testimony unworthy of belief and perjurious.

17. That plaintiff, Isadore Blau, did not pay for any shares of the common stock of defendant Air-Way Industries, Inc.

18. That the testimony of plaintiff, Isadore Blau, that he paid cash funds belonging to him to Cohen, Simonson & Co. for said stock is false.

19. That in 1956, plaintiff, Isadore Blau, had one savings bank account in the National City Bank, Borough Park Branch, Brooklyn.

20. That on March 1, 1956, there was a balance of $6.71 in said account.

21. That between March 1, 1956 and May 6, 1956, plaintiff, Isadore Blau, deposited the sum of $11.85 into said account.

22. That between March 1, 1956 and May 6, 1956, the largest balance in said bank account was the sum of $18.56.

23. That for the balance of the year 1956, plaintiff, Isadore Blau, deposited the sum of $2.67 into said bank account.

24. That the only withdrawal of funds from said bank account was the sum of $63.00 on March 1, 1956 and the sum of $19.00 on June 4, 1956.

25. That neither of said withdrawals on March 1, 1956 or June 4, 1956 represented the sum paid to Cohen, Simonson & Co. for the common stock of Air-Way Industries on May 3, 1956.

26. That in 1956, the plaintiff, Isadore Blau, had no other bank accounts whatsoever.

27. That the records maintained by the plaintiff, Isadore Blau, of his business transactions, did not reflect the withdrawal by the plaintiff of any funds used to pay for the 100 shares of Air-Way Industries common stock, or of any portion of said funds.

28. That plaintiff, Isadore Blau, was not possessed of sufficient funds of his own to buy or pay for the common stock of Air-Way Industries, Inc.

29. That plaintiff, Isadore Blau, did not use his own funds to pay for the common stock of Air-Way Industries, Inc.

30. That if the plaintiff, Isadore Blau, did pay cash for 100 shares of Air-Way Industries stock on May 3, 1956, he made such payment as a nominee for another person and not for his own benefit.

Conclusions of Law

1. That an action to recover profits under the provisions of Section 16(b) of the Securities Exchange Act of 1934

can only be instituted by the owner of a security if said action was not instituted by Air-Way Industries, Inc.

2. That no such action was instituted by Air-Way Industries, Inc.

3. That plaintiff was not the owner of any security of Air-Way Industries, Inc.

4. That plaintiff was not the real party in interest.

5. That the defendants are entitled to judgment against the plaintiff, dismissing the complaint.

6. That the plaintiff pay the costs and disbursements of this action.

7. That judgment is directed in conformity with these Findings.

Dated: July 6, 1961.

LLOYD F. MAC MAHON /s/
U. S. D. J.

Judgment Entered July 6, 1961

APPENDIX D

Opinion of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 251—October Term, 1962

(Argued March 7, 1963 Decided March 8, 1963)

Docket No. 27238

ISADORE BLAU, a stockholder of Air-Way Industries, Inc., suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of Air-Way Industries, Inc.,

Plaintiff-Appellant,

v.

EDWARD LAMB, FRANK C. OSWALD, EDWARD LAMB ENTERPRISES, INC., and AIR-WAY INDUSTRIES, INC.,

Defendants-Appellees.

Before:

CLARK, WATERMAN and KAUFMAN, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Lloyd F. MacMahon, Judge.

Plaintiff appeals from the summary dismissal of his action to recover "short swing" profits for the benefit of Air-Way Industries, Inc., from defendants—officers, directors, or 10% stockholders of the corporation—under the

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Securities Exchange Act of 1934, § 16(b), 15 U. S. C. § 78p(b). Reversed and remanded.

See also 20 F. R. D. 411; 163 F. Supp. 528; 191 F. Supp. 906.

MORRIS J. LEVY, New York City, *for plaintiff-appellant.*

JEROME M. STEMBER, of Stember & Dershowitz, New York City (Eugene Farber, Toledo, Ohio, on the brief for defendant-appellee Air-Way Industries, Inc.), *for defendants-appellees.*

PETER A. DAMMANN, Gen. Counsel, David Ferber, Assoc. Gen. Counsel, and John A. Dudley, Atty., Securities and Exchange Commission, Washington, D. C., for Securities and Exchange Commission *amicus curiae.*

CLARK, *Circuit Judge.*

The district court summarily dismissed the plaintiff's action to recover "short swing" profits under the Securities Exchange Act of 1934, § 16(b), 15 U. S. C. § 78p(b), for the benefit of Air-Way Industries, Inc., because it held him not to be the bona fide owner of securities of the corporation at the time the action was brought, and hence not the real party in interest. It was not disputed that some time before the action was instituted, the plainitff had bought 100 shares on his margin account with a broker, that the broker asked for increase of margin of $470, which plaintiff paid, and that the broker then credited Blau as the owner in the statements issued monthly, and also credited him with a stock dividend paid by the corporation and with cash dividends as they were received. The stock remained in the broker's name, or in "street name" as it is called, until transferred to Blau before the trial on settlement of

the account. During all this time the broker accepted Blau as owner, and it is not questioned that this he was legally obliged to do. The court, however, sought to determine the beneficial ownership of the stock and held unbelievable Blau's own testimony that he had cash funds adequate to pay the account, noting the lack of any bank accounts or signs of wealth beyond Blau's own statement. So it concluded that Blau was actually holding the stock as nominee for someone undisclosed, and hence was not the real party in interest.

We think the court took an unduly technical view of the requirement of ownership, thus defeating the remedial purposes of the statute which have been stressed ever since the leading case of *Smolowe v. Delendo Corp.*, 2 Cir., 136 F. 2d 231, 148 A. L. R. 300, cert. denied *Delendo Corp.* v. *Smolowe*, 320 U. S. 751. It is well settled that, since recovery is for the corporation, it is the real party in interest and the stockholder plaintiff is but "the mere vehicle of recovery." *Magida* v. *Continental Can Co.*, 2 Cir., 231 F. 2d 843, 848, cert. denied *Continental Can Co.* v. *Magida*, 351 U. S. 972. The statute provides that suit to recover such profit may be brought "by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer" if the latter fails to sue within 60 days after request (as it had here). Sec. 16(b) *supra*. This inclusive language is to be contrasted with the reference made in subd. (a) to "the beneficial owner of more than 10 per centum of any class of any equity security" who is one of those held liable to pay such profits to the corporation (the others being the officers or directors). The inference that here "owner" is not limited to "beneficial" owner seems clear. Since "owner" is a word having a variety of meanings, with its significance varying according to the context and the subject matter with which it is used, *cf. Blumenfeld* v. *United States*, 8 Cir., 306 F. 2d 892, 899, 900, the broader meaning here is better suited to carry

out the remedial purpose of the statute and to enforce the fiduciary nature of the plaintiff's position as to the corporation. Thus we agree with the view taken by the Securities and Exchange Commission in its helpful brief *amicus curiae*.

It is to be noted that this interpretation not only furthers the statutory purpose, but is also the one usual in defining the real party in interest. A defendant who raises this defense (and it is a matter of defense to be raised only by affirmative allegation, Clark, Code Pleading 208, 2d Ed. 1947) is entitled only to show that the plaintiff has not such right as to afford the protection of *res judicata* when the suit is terminated. Thus a defendant is not a vicarious defender for the entire world, but must rest on his own right. "Since the claim is owned and may be sued upon by someone, all a defendant may properly ask is such a party plaintiff as will render the judgment final and res adjudicata of the right sued upon." *Rosenblum* v. *Dingfelder*, 2 Cir., 111 F. 2d 406, 407. This of course is even more in point when the corporation is the real party in interest and its right continues, whatever the vicissitudes affecting its temporary protagonist. The court's view that Blau was acting for some nominee has no support whatsoever in the evidence; at best it is only a guess, however shrewd a guess it may be. But that fact, if true, would have no bearing here, since Blau obviously had sufficient indicia of ownership to protect his right under the statute and the usual construction of F. R. 17(a), the real-party-in-interest rule. See Clark, Code Pleading 158-161 (2d Ed. 1947).

The decision must therefore be reversed and the action remanded for a trial on the merits.

APPENDIX E

Decree

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March, one thousand nine hundred and sixty-three.

Present: HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. IRVING R. KAUFMAN,
Circuit Judges.

ISADORE BLAU, a stockholder of Air-Way Industries, Inc., suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of Air-Way Industries, Inc.,

Plaintiff-Appellant,

v.

EDWARD LAMB, FRANK C. OSWALD, EDWARD LAMB ENTERPRISES, INC., and AIR-WAY INDUSTRIES,

Defendants-Appellees,

EDWARD LAMB FOUNDATION, INC.,

Defendant.

Appeal from the United States District Court for the Southern District of New York.

Appendix E

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for a trial on the merits in accordance with the opinion of this Court; with costs to the appellant.

A. Daniel Fusaro
Clerk